

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHERMAN I. PULLEY,

Petitioner,

vs.

RICHARD MORGAN,

Respondent.

NO. CV-05-5020-EFS

ORDER DISMISSING PETITION AS TIME-
BARRED

BEFORE THE COURT is Petitioner's "Answer to Order to Show Cause," (Ct. Rec. 7), filed April 19, 2005. The Court directed Petitioner on March 25, 2005, to show cause why his petition should not be dismissed as time-barred under 28 U.S.C. § 2244(d). Petitioner, a prisoner at the Washington State Penitentiary (WSP), is proceeding *pro se* and has paid the filing fee. After review of Mr. Pulley's "Answer," the Court finds his petition is untimely under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

In 1998, Petitioner was convicted of First Degree Burglary and sentenced under the "persistent offender" statute to Life Without the Possibility of Parole. Petitioner asserts his direct appeal concluded with the issuance of a mandate by the Washington State Court of Appeals, Division III, on March 25, 2002. For purposes of the federal

1 limitations period under 28 U.S.C. § 2244(d) "it is the decision of
2 the state appellate court, rather than the ministerial act of entry of
3 the mandate, that signals the conclusion of review." *Wixom v. Wash.*,
4 264 F.3d 894, 897-98 (9th Cir. 2001). Accordingly, for the reasons
5 set forth in the Order to Show Cause and based on Washington Rules of
6 Appellate Procedure, this Court has determined that March 18, 2002,
7 marks the conclusion of direct appellate review for purposes of §
8 2244(d)(1)(A). Petitioner presents no facts to delay the running of
9 the limitations period under 28 U.S.C. §§ 2244(d)(1)(B)-(D).

10 Petitioner asserts he is entitled to an additional period of
11 statutory tolling which he omitted from his petition. He states he
12 had a Motion to Vacate Judgment pending in the Spokane County Superior
13 Court between October 10, 2002, and November 21, 2002. Petitioner
14 asks this Court to extend the tolling period for the time during which
15 he could have filed an appeal of the denial of his Motion, but did
16 not.

17 The statute of limitations is tolled under § 2244(d)(2) only for
18 "[t]he time during which a properly filed application for State
19 post-conviction or other collateral review ... is pending." In
20 failing to appeal the Superior Court's decision, Petitioner was not
21 "attempting, through proper use of state court procedures, to exhaust
22 state court remedies" See *Nino v. Galaza*, 183 F.3d 1003, 1006
23 (9th Cir. 1999). Petitioner presents nothing to demonstrate the
24 decision to deny his Motion to Vacate Judgment on November 21, 2002,
25 became final on a later date. Mr. Pulley is not entitled to statutory
26 tolling under § 2244(d)(2) for a time period when he claims he could
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1 have sought further review, but he did not. See e.g., *White v.*
2 *Klitzkie*, 281 F.3d 920, 924-25 (9th Cir. 2002) (finding not entitled to
3 statutory tolling under § 2244(d)(2) for the time during which he
4 contends he could have filed a petition for a writ of certiorari in
5 the United States Supreme Court).

6 Assuming Mr. Pulley's Motion to Vacate Judgment was a "properly
7 filed application for State post-conviction or other collateral review
8 with respect to the pertinent judgment or claim" under 28 U.S.C. §
9 2244(d)(2), approximately 206 days of the federal limitations period
10 had already expired before Mr. Pulley filed his motion on October 10,
11 2002. The period of limitations resumed running on or about November
12 22, 2002.

13 Even if March 22, 2003, was the actual date Mr. Pulley filed his
14 Personal Restraint Petition in the Court of Appeals, an additional 120
15 days had expired, totaling 326 days, before he did so. The issue
16 whether Mr. Pulley's Personal Restraint Petition was timely under
17 state law is an issue for the state courts to determine and has no
18 bearing on the calculation of the federal limitations period.

19 At the time the Washington State Supreme Court denied
20 Petitioner's Motion to Modify Commissioner's ruling on February 3,
21 2004, there were only 39 days remaining in the statutory period in
22 which to file his federal habeas corpus petition. Unless Petitioner
23 can demonstrate a basis for equitable tolling, the petition signed
24 February 11, 2005, is untimely under 28 U.S.C. § 2244(d).

25 **EQUITABLE TOLLING**

26 Equitable tolling under the Anti-Terrorism and Effective Death
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1 Penalty Act (AEDPA) is appropriate only where extraordinary
2 circumstances beyond a prisoner's control render it impossible to
3 timely file a petition. *Calderon v. United States District Court*
4 (*Beeler*), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other
5 grounds by *Calderon v. United States District Court (Kelly)*, 163 F.3d
6 530 (9th Cir. 1998) (*en banc*). "When external forces, rather than a
7 petitioner's lack of diligence, account for the failure to file a
8 timely claim, equitable tolling of the statute of limitations may be
9 appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999).
10 Petitioner fails to allege extraordinary circumstances which would
11 justify equitable tolling of the statute of limitations. *See Beeler*,
12 128 F.3d at 1288-89.

13 ***Abandonment by Counsel***

14 Mr. Pulley contends his counsel abandoned his case, thus
15 preventing him from filing a Motion for Discretionary Review with the
16 Washington State Supreme Court on direct appeal. Lack of legal
17 assistance, however, is generally insufficient to justify tolling the
18 statute of limitations. *Hughes v. Idaho Bd. of Corr.*, 800 F.2d 905,
19 909 (9th Cir. 1986). Furthermore, an attorney's "miscalculation of
20 the limitations period . . . and his negligence in general do not
21 constitute extraordinary circumstances sufficient to warrant equitable
22 tolling." *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001).
23 Petitioner has not shown a basis for equitable tolling.

24 ***Inadequate law library access***

25 Next, Mr. Pulley asserts extremely limited access to the law
26 library should equitably toll the limitations period between February
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1 3, 2004, and February 11, 2005. He complains the law library is only
2 open five days per week; he was permitted to use it only approximately
3 nine hours and fifteen minutes per week; and other factors, including
4 his job, limited his access further, down to only 203 hours and 40
5 minutes in a 365 day period. He contends this did not afford him
6 adequate time to access the law library to research and prepare his
7 pleadings. Petitioner's complaint that his law library use was
8 interrupted in April 2005 is irrelevant to determining whether Mr.
9 Pulley was prevented from filing a timely petition.

10 The limited law library access described by Petitioner does not
11 demonstrate it was impossible for him to file a timely federal habeas
12 petition. See *Lott v. Mueller*, 304 F.3d 918 (9th Cir. 2002) (holding
13 that a prisoner was entitled to equitable tolling if he was denied
14 access to his legal files for 82 days, and remanding for a factual
15 determination of whether petitioner's allegation to that effect was
16 true); *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en
17 banc) (remanding for development of the record on whether
18 unavailability of AEDPA materials in the prison law library provided
19 grounds for equitable tolling); *Miles*, 187 F.3d at 1107 (applying
20 equitable tolling where prison officials delayed mailing petition and
21 filing fee). The petitioner bears the burden of proving that he is
22 entitled to equitable tolling. *Smith v. Duncan*, 297 F.3d 809, 814 (9th
23 Cir. 2002). Petitioner has not done so.

24 ***Claim of legal innocence***

25 Petitioner requests equitable tolling from February 3, 2004, to
26 February 11, 2005, "because the petitioner was denied a full and fair
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1 review on the issue challenging the sufficiency of the evidence,
2 because petitioner's similarly situated with actual innocence claims."
3 He further contends that "the limitations period would
4 unconstitutionally suspend habeas relief where the Petitioner shows
5 insufficient evidence or legal innocence and, therefore, an
6 insufficiency of the evidence exception must be read into the
7 provision of § 2244(d)." Petitioner's assertions lack merit.

8 Under the actual innocence gateway of *Schlup v. Delo*, 513 U.S.
9 298 (1995), a petitioner's procedurally barred claim may be considered
10 on the merits if his claim of actual innocence is sufficient to
11 implicate a fundamental miscarriage of justice. *Majoy v. Roe*, 296 F.3d
12 770, 775-76 (9th Cir. 2002). Even if the actual innocence gateway
13 could override the AEDPA's statute of limitations, *id.* at 776,
14 Petitioner has failed to present sufficient evidence to show that it
15 is more likely than not that no reasonable juror would have convicted
16 him, see *Sistrunk v. Armenakis*, 292 F.3d 669, 673, 677 (9th Cir. 2002)
17 (*en banc*) (quotations and citations omitted); see also *Bousley v.*
18 *United States*, 523 U.S. 614, 623 (1998) (Evidence must demonstrate
19 "factual innocence, not merely legal insufficiency").

20 "To be credible, [an actual innocence] claim requires petitioner
21 to support his allegations of constitutional error with new reliable
22 evidence--whether it be exculpatory scientific evidence, trustworthy
23 eyewitness accounts, or critical physical evidence--that was not
24 presented at trial." *Schlup*, 513 U.S. at 324 (emphasis added). Here,
25 Mr. Pulley merely re-asserts claims based on evidence presented at his
26 trial. He has failed to make a showing of actual innocence as a basis
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1 for equitably tolling the federal limitations period.

2 Petitioner argues that simply the nature of his claim -- the
3 insufficiency of the evidence -- should justify equitable tolling from
4 February 3, 2004, until February 11, 2005. There is no federal
5 authority to support Mr. Pulley's argument. For the reasons set
6 forth above and in the court's previous Order, **IT IS ORDERED** the
7 petition is **DISMISSED with prejudice** as time-barred under 28 U.S.C.
8 §2244(d).

9 **IT IS SO ORDERED.** The District Court Executive is directed to
10 enter this Order, enter judgment, forward a copy to Petitioner at his
11 last known address, and close the file.

12 **DATED** this 28th day of April 2005.

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14 S/ Edward F. Shea
15 _____
16 EDWARD F. SHEA
17 UNITED STATES DISTRICT JUDGE

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